



ARKANSAS JUDICIARY

Published on *Arkansas Judiciary* (<https://courts.arkansas.gov>)

Rule 32. Use Of Depositions In Court Proceedings.

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Arkansas Rules of Evidence.

(2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition taken without leave of court pursuant to a notice under Rule 30(b)(2) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Arkansas Rules of

Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. The transcript must be prepared by a certified court reporter from the nonstenographic recording. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions.

(1) As To Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As To Disqualification Of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As To Taking Of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As To Completion And Return Of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such is, or with due diligence might have been ascertained.

Reporter's Notes to Rule 32: - 1. With the exception of minor wording changes necessary to adapt FRCP 32 to state practice, Rule 32 is essentially the same as the Federal Rule. This rule tracks Ark. Stat. Ann. 28-348 and 28-354 (Repl. 1962) and does not work any significant changes in Arkansas practice.

2. Section (c) of FRCP 32 was abrogated in 1972 and the Federal Rules of Evidence now control the effect of taking or using depositions in federal courts. This section is also omitted from Rule 32 as the Uniform Rules of Evidence adopted in this State also control on this same question.

Additions to Reporter's Notes, 1984 Amendments: - Rule 32(a)(1) is amended to broaden the

uses of depositions at trial beyond impeachment by permitting their use for any purpose permitted by the evidence rules.

Addition to Reporter's Note, 1989 Amendment: - As initially adopted, the second paragraph of Rule 32(a)(4) provided that a prior action must have been dismissed before depositions taken for use in it could be used in a subsequent action. The 1989 amendment permits the use of a deposition from a prior action to the extent allowed by the Rules of Evidence. The corresponding federal rule was so amended in 1980. In addition, the 1989 amendment eliminates the requirement that a deposition taken in a prior action must have been filed in order for it to be used in a subsequent action. This change is consistent with Rule 5(c), which, as amended in 1984, does not require that depositions be filed as a matter of course.

Addition to Reporter's Notes, 1997 Amendment: - Subdivision (a)(3) has been amended by adding a new paragraph that includes not only the substance of provisions formerly found in Rule 30(b)(2), but also new language dealing with the situation in which a party who receives minimal notice of a deposition is unable to obtain a court ruling on a motion for protective order seeking to delay or change the place of the deposition. Ordinarily, a party does not obtain protection merely by the filing of a motion under Rule 26(c); any such protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided that its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Former subdivision (c) has been redesignated as subdivision (d), without change, and a new subdivision (c) added to reflect the increased opportunities for video and audio recording of depositions under revised Rule 30. Under the new provision, a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise.

Addition to Reporter's Notes, 1998 Amendment: - Subdivision (c) requires that the court be furnished with a transcript of any deposition testimony presented at trial in nonstenographic form. It was not clear, however, whether the transcript had to be certified by the officer before whom the deposition was taken. If that were so, the rule would as a practical matter require the presence of a court reporter at video depositions; under Section 9 of the rules providing for certification of court reporters, 'transcripts . . . will be accepted only if they are certified by a court reporter who holds a valid certificate under this Rule.' Such a result would be at odds with Rule 30(b), which contemplates depositions taken by nonstenographic means only. Accordingly, a new second sentence has been added to Rule 32(c) making plain that the transcript must be prepared by a certified court reporter from the audio or video tape recording of the deposition, thereby ensuring that the transcript accurately reflects what is on the tape offered at trial.

History Text:

History. Amended July 9, 1984, effective September 1, 1984; amended November 20, 1989, effective January 1, 1990; amended November 11, 1991, effective January 1, 1992; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998

Associated Court Rules:

Rules of Civil Procedure

Group Title:

V. Depositions and Discovery

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